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No. 08-37

File Date:
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In the Supreme Court of the United States

CHECK INVESTORS, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are "debt collectors" subject to the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*

2. Whether the Federal Trade Commission acted within its authority by seeking injunctive and monetary relief against petitioners in district court under the FDCPA and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*

3. Whether the district court acted within its authority by requiring petitioners to disgorge the money they had collected from consumers through the use of abusive and deceptive debt collection practices that violated the FDCPA and the FTC Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 502 F.3d 159. The opinion of the district court (Pet. App. 35-58) is not published in the *Federal Supplement* but is available at 2005 WL 1677480. The final order of the district court (Pet. App. 59-81) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. Petitions for rehearing were denied on February 6, 2008 (Pet. App. 82-83, 84-85). On April 24, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including

July 5, 2008. The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc., are entities that are or were engaged in the business of purchasing, and then trying to collect upon, large numbers of checks that had been written by retail customers on accounts containing insufficient funds (NSF checks). Petitioner Barry Sussman is or was a corporate officer of those entities. Charles Hutchins is or was general counsel of the entities. Pet. App. 2-3 & nn.1-2.[1]

a. Petitioners purchased NSF checks from several check guaranty companies after the guaranty companies' attempts to collect on the checks had failed. Typically, the guaranty company had paid the full face value of the check to the merchant who had accepted the check as payment. In exchange, the merchant assigned its rights in the NSF check to the guaranty company. The guaranty company then would attempt to obtain payment on the NSF check from the bank on which the check was drawn or from the consumer who had tendered the check. If those collection efforts were unsuccessful, the guaranty company would hire one or more debt collection agencies to attempt to collect on the check on a contingency-fee basis. If those collection efforts also were unsuccessful, the guaranty company would sell the NSF check to petitioners for a small fraction of its face amount. Petitioners purchased over 2.2

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[1] Hutchins has filed a separate petition for a writ of certiorari arising from the same judgment that is at issue in this case. *Hutchins* v. *FTC*, No. 08-39 (filed July 3, 2008).

million NSF checks with an estimated face value of $348 million. Pet. App. 3-4.

b. Petitioners routinely attempted to collect from the check writer a sum of money that was $125 or $130 more than the face value of the NSF check—in effect, charging a collection fee that exceeded the legal limit under the laws of most states. Petitioners' collection tactics also included aggressive dunning of consumers through letters and telephone calls demanding the full amount allegedly owed without disclosing the face amount of the check or the amount of the additional fee. Petitioners accused consumers of being criminals or "crooks" and falsely threatened consumers with arrest and criminal or civil prosecution if they failed to pay the amount owed. Petitioners also sent form collection letters purporting to be from Hutchins, their general counsel. The letters indicated that Hutchins was considering legal action when, in fact, Hutchins had not investigated the status of the debts at issue. Petitioners employed other harassing collection techniques as well, such as the use of abusive language, contacting consumers' family members about the alleged debts, and "saturation phoning" whereby a consumer would be called repeatedly over a short period of time. Between January 1, 2000, and January 6, 2003, petitioners collected $10.2 million on NSF checks written by more than 42,000 consumers. Pet. App. 4-7.

2. The Federal Trade Co nmission (FTC) filed suit in the United States District Court for the District of New Jersey. The FTC's complaint alleged that the debt-collection practices employed by petitioners and Hutchins violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* The

FTC sought injunctive relief and monetary restitution for injured customers. Pet. App. 7-8.

a. The FDCPA applies to "debt collectors" and prohibits a variety of debt collection practices, including harassment or abuse of the consumer (such as the use of obscene language and repeated telephone calls), 15 U.S.C. 1692d; false or misleading representations (including false assertions concerning the character, amount, or legal status of a debt or the consequences of failing to pay a debt), 15 U.S.C. 1692e; and unfair practices (such as collecting fees in excess of those permitted by law), 15 U.S.C. 1692f. Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a).

b. The parties filed cross-motions for summary judgment. Petitioners and Hutchins did not dispute that they had engaged in the collection practices alleged by the FTC. They asserted, *inter alia*, that the FDCPA did not apply to them because they were "creditors" collecting obligations owed to themselves rather than "debt collectors" collecting obligations owed to a third party. Petitioners and Hutchins also contended that the individuals who had written the NSF checks were criminals or tortfeasors and therefore were not "consumers" entitled to the protections of the FDCPA. Pet. App. 9.

c. The district court granted the FTC's motion for summary judgment and denied petitioners' cross-motion. Pet. App. 35-58. The court held that petitioners were "debt collectors" collecting "debts" as those terms are defined in the FDCPA. *Id.* at 48-54. The court also held that the uncontested evidence demonstrated that petitioners had violated multiple provisions of the FDCPA and Section 5 of the FTC Act. *Id.* at 54-57. The court permanently enjoined petitioners from engaging

in debt-collection activities, violating the FDCPA, and making certain misrepresentations. *Id.* at 65-68. The court also ordered petitioners to pay to the FTC, as restitution for consumer injury, the full amount petitioners had collected through the use of their unlawful practices, a sum that exceeded $10.2 million. *Id.* at 57-58, 69-70.

3. The court of appeals affirmed. Pet. App. 1-34. The court first held that the NSF checks that petitioners had purchased were "debts" under the FDCPA. *Id.* at 16-24. The court noted that the FDCPA defines "debt" broadly to mean "any obligation to pay arising out of a [consumer] transaction." *Id.* at 18 (quoting *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (7th Cir. 1997)).[2] Agreeing with the four other courts of appeals that had addressed the issue, the court concluded that a NSF check "evidences the drawer's obligation to pay for the purchases made with the check" and thus is a "debt" under the FDCPA. *Id.* at 18-19 (emphasis omitted) (quoting *Bass*, 111 F.3d at 1325).

The court of appeals also rejected petitioners' argument that NSF checks are not "debts" because they arise out of criminal or tortious conduct, rather than out of a consumer transaction. Pet. App. 19-24. The court noted that under the common law of fraud and under most criminal statutes, a NSF check cannot be the basis for tort or criminal liability unless the drawer "either knew or intended that the check be dishonored *at the*

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[2] The full definition of "debt" for purposes of the FDCPA is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

time the check was drawn." *Id.* at 20 (quoting *Bass*, 111 F.3d at 1329). Because a bank can refuse payment on a check for many reasons, and because the drawer of a dishonored check may not have a criminal or fraudulent intent at the time the check was drawn, the court rejected the "argument that all dishonored checks are fraudulent and thus not covered by the [FDCPA]." *Id.* at 20-21 (brackets in original) (quoting *Bass*, 111 F.3d at 1329). The court also concluded that the "explicit and unambiguous text of the FDCPA" demonstrated that it contains no "fraud exception," a conclusion reinforced by the legislative history. *Id.* at 21-24. The court noted that "[n]o section of the [FDCPA] requires an inquiry into [the] worthiness of the debtor, or purports to protect only 'deserving' debtors," and that the "singular focus [of the FDCPA] is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." *Id.* at 22 (quoting *Bass*, 111 F.3d at 1330).

The court of appeals also rejected petitioners' claim that the payors of NSF checks are not "consumers" entitled to the protections of the FDCPA. Pet. App. 24-25. The court noted that the FDCPA defines "consumer" as "*any* natural person obligated or allegedly obligated to pay *any* debt." *Id.* at 25 (emphasis in original) (quoting 15 U.S.C. 1692a(3)). Having already determined that NSF checks are "debts" under the FDCPA, the court concluded that the "all inclusive" statutory definition "unambiguously" encompassed the payors of NSF checks. *Ibid.*

The court of appeals further held that petitioners are "debt collectors" rather than "creditors" under the FDCPA. Pet. App. 26-33. The court recited the applicable statutory definition of the term "creditor":

> [A]ny person who offers or extends credit creating a debt or *to whom a debt is owed*, but such term does not include any person to the extent [that] he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

Id. at 28 (emphasis in original) (quoting 15 U.S.C. 1692a(4)). The court rejected petitioners' argument that because they had *purchased* the NSF checks from the guaranty companies, they were creditors "to whom a debt [was] owed" and not debt collectors collecting debts owed to another. *Ibid.* The court observed that petitioners' interpretation of the statute "would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Ibid.*

The court of appeals also noted that the FDCPA's definition of the term "debt collector" excludes persons collecting debt due to another to the extent that such activity "concern[ed] a debt which was not in default at the time it was obtained by such person." Pet. App. 29-30 (quoting 15 U.S.C. 1692a(6)(F)(iii)).[3] The court con-

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[3] The FDCPA defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The statutory definition contains several exclusions. The exclusion identified by the court of appeals applies to "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

cluded that, through the definition of "debt collector," "Congress ha[d] unambiguously directed [the court's] focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* at 30. The court also relied on legislative history confirming that Congress's focus in the FDCPA was on "third-party collectors of past due debts" who, unlike creditors, would not be constrained in their collection tactics by the desire to maintain good will with the consumer. *Id.* at 30-31. Applying those principles to the facts of this case, the court held that petitioners were "debt collectors" subject to the FDCPA because they "acquired the defaulted checks only for collection purposes." *Id.* at 31. The court also observed that petitioners' "course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so." *Id.* at 33.

The court of appeals held that petitioners' conduct was prohibited by the FTC Act as well. Pet. App. 33-34. The court explained that the FTC Act prohibits deceptive acts or practices employed in the collection of debts, *id.* at 33 (citing *Trans World Accounts, Inc.* v. *FTC*, 594 F.2d 212, 214 (9th Cir. 1979)), and that the payors of the NSF checks were therefore "consumer[s]" within the meaning of the FTC Act. *Ibid.* The court further concluded that the debt collection techniques utilized by petitioners constituted a "deceptive business practice" within the meaning of the FTC Act. *Id.* at 34.

ARGUMENT

Petitioners concede (Pet. 14) that they "engaged in aggressive methods and tactics which are prohibited by federal law when engaged in by professional debt collectors." They contend, however, that the court of appeals

erred by finding that they are "debt collectors" subject to the FDCPA. Petitioners also raise challenges to the FTC's authority to seek injunctive and equitable relief in this case, as well as to the district court's authority to order disgorgement of all the proceeds that petitioners obtained through their illegal debt-collection methods.

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners' challenges to the authority of the FTC and the district court are not properly before the Court and are without merit. Further review is not warranted.

1. Petitioners contend (Pet. 14-19) that they are not "debt collectors" subject to the restrictions of the FDCPA. The court of appeals correctly rejected that contention, and its interpretation of the relevant statutory provisions is consistent with the decisions of other courts of appeals as well as with the statute's text and legislative history.

The FDCPA provides alternative definitions of the term "debt collector," one of which is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts[.]" 15 U.S.C. 1692a(6); see note 3, *supra*. Petitioners did not dispute in the lower courts that they used instrumentalities of interstate commerce in their business (*e.g.*, the mail and telephones), nor did they dispute that the "principal purpose" of their business was to collect the amounts due on NSF checks. Gov't C.A. Br. 23. Petitioners also do not challenge the court of appeals' holding that NSF checks constitute "debts" under the FDCPA. Petitioners therefore fell squarely within the statutory definition of "debt collector."

Petitioners respond (Pet. 16-19) that they qualify for the "creditor" exception to the definition of "debt collector." See 15 U.S.C. 1692a(6)(A) (excluding from term "debt collector" any officer or employee of a "creditor" while collecting debts for the creditor in the name of the creditor). The FDCPA defines the term "creditor" to include "any person * * * to whom a debt is owed," but *excludes* from that category any person who "receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. 1692a(4); see p. 7, *supra*. Petitioners "accept[ ] for purposes of argument" (Pet. 16-17) that they received an "assignment" of the NSF checks after the checks were in default. Petitioners contend (Pet. 17) that they are "creditors" nonetheless because their "purpose" was to collect the debts *for themselves* and not "for another." The court of appeals correctly rejected that argument.

The "assignment" exception to the FDCPA's definition of creditor is unclear, because an "assignment" of a debt generally will result in a transfer of all rights in the debt, meaning that "any collection of [the] debt by the assignee would generally be for itself." *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987). The "assignment" exception nonetheless "refers to the assignee's collection as being for another." *Ibid.* Ambiguity also arises from the clause that precedes the "assignment" exception, which defines "creditor" to include only "those who originate a debt or to whom a debt is owed," *i.e.*, persons who collect debts *for themselves*. Interpreting the "assignment" exception to cover only those who collect debts *for another* would "render the exception superfluous and meaningless" because "those who collect debts for others are not in the original defi-

nitional universe, and there is therefore no need to exclude them." *Ibid.*

To resolve the ambiguities presented by the "for another" phrase in the "assignment" exception, the court of appeals correctly considered the broader statutory context and the legislative history of the FDCPA . See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (interpretation of a word or phrase in a statute "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The court recognized that petitioners' interpretation of the phrase "for another" would "weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." Pet. App. 28.

First, petitioners' interpretation would create conflicts with other provisions of the statutory scheme that address third parties who collect debts that originally were due to another—such as the definition of "debt collector"—in which Congress "unambiguously directed [courts to] focus [on] the time the debt was acquired [*i.e.*, whether the debt was already in default at the time of the acquisition] in determining whether one is acting as a creditor or debt collector under the FDCPA." Pet. App. 30. Second, petitioners' interpretation would frustrate Congress's intent to include within the category of "debt collector" third persons who regularly collect debts, on the theory that those independent debt collectors likely will have "no future contact with the consumer" and, as a result, their debt-collection tactics will not be "restrained by the desire to protect their good will when collecting past due accounts." *Id.* at 30-31 (quoting *Fair Debt Collection Practices Act*, S. Rep. No.

382, 95th Cong., 1st Sess. 2 (1977)). In light of the statutory context and the legislative history, the phrase "for another" in the "assignment" exception is best understood to mean "that the debts should have *originally* belonged to another and that the creditor was therefore in effect a third-party or independent creditor" who would be subject to the consumer-protection provisions of the FDCPA. *Kimber*, 668 F. Supp. at 1485.

Petitioners demonstrate no error in the court of appeals' statutory analysis, nor is there a conflict between the court's decision and a decision of this Court or any other court of appeals. Indeed, the other courts of appeals to have addressed the issue agree that the statutory distinction between a "creditor" and a "debt collector" depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment. Pet. App. 30 (citing, *inter alia*, *Schlosser* v. *Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Wadlington* v. *Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996); *Perry* v. *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)).[4] Because petitioners acquired the NSF checks when those debts

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[4] Petitioners imply (Pet. 18) that the court of appeals' decision conflicts with *Wadlington*. That is incorrect. In *Wadlington*, it was "uncontested" that the FDCPA defendant had been assigned the debts at issue *before* they were in default. 76 F.3d at 104. The Sixth Circuit held that, as a result, the defendant was a "creditor" and not a "debt collector" for purposes of the FDCPA. *Id.* at 106-107. The courts in this case and in *Wadlington* thus applied the same interpretation of the terms "creditor" and "debt collector" under the FDCPA. The results of the two analyses differed because the *facts* of each case were different on the crucial question of whether the debts at issue were in default at the time they were assigned to the third-party collector.

were in default, the court correctly held that petitioners were "debt collectors" for purposes of the FDCPA.

2. Petitioners contend (Pet. 19-24) that the FTC acted outside its authority by pursuing relief for violations of the FDCPA in the district court without also initiating an administrative proceeding. Petitioners failed to raise that argument in the lower courts. Accordingly, the argument is not properly before the Court and should be rejected on that basis alone. *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007) (Court ordinarily does not consider claims that were neither raised nor addressed below).

Petitioners' argument also lacks merit. The FDCPA provides that the FTC may use "[a]ll of the functions and powers" available to it under the FTC Act to enforce the FDCPA. 15 U.S.C. 1692*l*(a). It is well settled that, pursuant to 15 U.S.C. 53(b), the FTC may initiate an action in federal district court seeking a permanent injunction and other equitable relief, including disgorgement, to enforce the FTC Act. *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995); *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1434 (11th Cir. 1984). Further, the FTC may use Section 13(b) of the FTC Act to obtain injunctive relief with respect to any other law that it enforces. *FTC* v. *Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985); *FTC* v. *Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 323 (S.D.N.Y. 2008). Congress recognized and expanded that authority when it enacted the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10(a)(2), 108 Stat. 1695; see S. Rep. No. 130, 103d Cong., 1st Sess. 16 (1993) ("[t]he FTC has used its section [13(b)]

injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts"). Because the FTC may use any authority available to it under the FTC Act to enforce the FDCPA, it acted within its authority under Section 13(b) by seeking injunctive and monetary relief against petitioners in district court.

Petitioners separately contend (Pet. 24-28) that the FTC acted outside its authority under 15 U.S.C. 45(n). The court of appeals did not address that claim, which petitioners first raised in their reply brief in that court. See *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (failure to identify or argue issue in opening brief constitutes waiver of argument on appeal), cert. denied, 540 U.S. 1219 (2004). Accordingly, the claim is not properly before this Court.

Petitioners' claim also lacks merit because 15 U.S.C. 45(n) is not implicated in this case. Section 5(n) of the FTC Act sets forth the standard of proof the FTC must satisfy in order to declare a practice "unfair" under 15 U.S.C. 45(a). The FTC did not allege that any of petitioners' acts or practices was "unfair" under the FTC Act, but instead asserted that petitioners' conduct violated Section 5(a) because it was *deceptive*. The standard of proof at 15 U.S.C. 45(n) does not apply when the FTC challenges conduct as "deceptive" under the FTC Act. Petitioners' claim is thus without merit.

3. Petitioners contend (Pet. 28-30) that the one-year statute of limitations set forth at 15 U.S.C. 1692k(d) limits the restitution the district court was authorized to order to the amount that petitioners unlawfully collected during the year that preceded the FTC complaint. Because petitioners failed to raise that argument in the

lower courts, it is not properly before this Court. Although petitioners describe (Pet. 28-29) the limitations period as a restriction on the "jurisdiction" of the district court, they offer no basis for departing from the general rule that statutes of limitations are waivable and non-jurisdictional. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.").

In any event, petitioners' argument lacks merit. The statute of limitations on which petitioners rely is a subsection of the FDCPA provision that establishes a *private* right of action by a person or a class of persons damaged by the unlawful practices of a debt collector. See 15 U.S.C. 1692k(a). There is no corresponding statute of limitations in the provision that authorizes the FTC to enforce the FDCPA, 15 U.S.C. 1692*l*. Reinforcing the conclusion that Section 1692k has no application here, the one-year limitation period on which petitioners rely applies to actions "to enforce any *liability*." 15 U.S.C. 1692k(d) (emphasis added). Actions brought by the FTC (or by other agencies authorized to enforce the FDCPA, 15 U.S.C. 1692*l*(b)) seek to secure equitable and other relief against a law violator, not to "enforce" a "liability." Thus, the one-year statute of limitations does not apply in this case and did not restrict the restitution the district court could properly order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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